DEPRIVATION OF LIBERTY OF CHILDREN

JUSTIN GRAY – TRINITY CHAMBERS – 19 OCTOBER 2022

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well meaning but without understanding." (Justice Louis Brandeis)

"There can be no keener revelation of a society's soul than the way in which it treats its children." (Nelson Mandela)

A. The right to liberty:

ECHR Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- ***(a)*** *the lawful detention of a person after conviction by a competent court*
- ***(b)*** *the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law*
- ***(c)*** *the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*
- ***(d)*** *the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority*
- ***(e)*** *the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants*
- ***(f)*** *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377

106. Subparagraph (d) is exclusively concerned with and limited to minors and although loosely described in conversation, or in oral argument as 'education', the permitted restriction is in much wider language, 'for the purpose of educational supervision'.
107. This goes far beyond school. It is not just about the restriction on liberty involved in requiring a reluctant child to remain at school for the school day. It arises in the context of the responsibilities of parents which extend well beyond ensuring the child's attendance at school. So it involves education in the broad sense, similar, I would respectfully suggest, to the general development of the child's physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development, where necessary, by restricting his liberty is permitted. If less were involved than this, there would be no purpose in including 'educational supervision' as an express restriction on the right of a minor to liberty: the recognition of 'custodial rights' and parental responsibilities would have sufficed. It is, of course, quite unreal for anyone to decide in theory, or for rigid guidelines to be laid down in advance, about the appropriate level of educational supervision which may be required by an individual child. The purpose of this order, and its implementation by the local authority, is to provide the best available environment to enable K's education, both in the narrow and broad senses, under the degree of supervision and control necessary to avoid harm or injury to himself, and to improve his prospects of avoiding both in the long term as well as the immediate future. I should add, that if K were to cause injury to others which in the remotest degree corresponded to his fantasies, apart from any injury to them, the end result would be significant harm to him, with the major risk of conviction for a desperately serious crime, and a correspondingly severe sentence.

108. In summary, the normal standards of acceptable parental control are undiminished by, indeed consistent with the convention. Therefore the restriction in art 5(1)(d) is specifically directed to the situation of those minors who are beyond such normal control. Prosecution and punishment do not invariably present the most efficacious solution to the behavioural problems of children and young persons, and their long-term development, whether viewed

entirely as a matter of their own self-interest or the general benefit of the community as a whole. There is much to be gained if the underlying causes of the misbehaviour of a child or young person can be examined and addressed. Hence the need to allow restrictions on the liberty of minors with such problems, which goes beyond normal parental control and allows for the educational supervision. The convention is not an appropriate instrument for spelling out precisely what form this may take or its limits. As Mr Garnham's helpful analysis of the differing procedures adopted in many of the countries adherent to the convention demonstrates, there are different traditions and regimes for dealing with troublesome as well as the criminal young. All these command respect, and the convention is not an appropriate instrument for spelling out precisely what form this should take, and which particular regime is acceptable.

<u>Article 2 of the Fourth Protocol:</u>

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
Everyone shall be free to leave any country, including his own.
No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

<u>Art 37 of the UN Convention on the Rights of the Child</u>

Article 37
States Parties shall ensure that:
<u>(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;</u>
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of

his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Guzzardi v Italy, 1980 3 EHRR 333

"the distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature of substance", and *"account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question."*

Stanev v Bulgaria, 2012 55 EHRR 22

115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by Article 2 of Protocol No. 4, is merely one of degree or intensity, and not one of nature or substance

ECHR Article 3:

Article 3 – Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

B. The power to authorise a deprivation of liberty

Children Act 1989 section 100(3)

(a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(5) This subsection applies to any order—
(a) made otherwise than in the exercise of the court's inherent jurisdiction; and
(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

Re T (A Child) [2021] UKSC 35

"Imperative conditions of necessity"

C. What constitutes a deprivation of liberty

<u>Storck v Germany (2005) 43 EHRR 96</u>

<u>Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and Chester Council v P and another (Same intervening) [2014] UKSC 19, [2014] AC 896 (Cheshire West)</u>

37. "… what is the essential character of a deprivation of liberty? … three components can be derived from <u>Storck</u> as follows:

(a) the objective component of confinement:

(i) in a particular restricted place, and

(ii) for a not negligible length of time;

(b) the subjective component of lack of valid consent; and

(c) the attribution of responsibility to the state."

49 "whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives."

> *"A person might be under constant supervision and control but still be free to leave should he express the desire so to do. Conversely, it is possible to imagine situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty."*

45. "In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent Page 18 dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities."

"whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the purposes of Storck component (a) has to be determined by comparing the restrictions to which the child in question is subject with the restrictions which would apply to a child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability".

In Re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377 (paras 99-102):

99 …the way in which parents restrict the movements of their children from time to time by, for example, putting young children into bed when they would rather be up, or "grounding" teenagers when they would prefer to be partying with their friends, or sending children to boarding schools, entrusting the schools with authority to restrict their movements … "grounding" a teenager, or ensuring that a group of teenagers at a boarding school are all back within school bounds by a certain time each evening … All this reflects the normal working of family life, in which parents are responsible for bringing up, teaching, enlightening and disciplining their children as necessary and appropriate, and into which the law and local authorities should only intervene when the parents' behaviour can fairly be stigmatised as cruel or abusive.

100 It is not necessary to deal with any argument that such parental behaviour might constitute an interference with a child's liberty or contravene his "human rights". No such absurdity was advanced. What however does arise for decision is whether what I have described as normal family life goes anywhere near what the local authority is empowered to do by a secure accommodation order.

101 By definition, the making of the order means that if accommodation less than adequate for the purpose of restricting liberty is provided, the child is likely to suffer significant harm because there is a history and continuing risk of absconding with a likelihood of significant harm or injury to himself or others. This means that he requires far more supervision and attention than any normal parent could reasonably provide or be expected to provide, and in accommodation which none of them have, that is accommodation provided for the very purpose of restricting a child's freedom. This is miles away from "grounding" a teenager, or ensuring that a group of teenagers at a boarding school are all back within school bounds by a certain time each evening, or any other manifestation of normal parental control. If the restrictions necessarily imposed on AK for his own safety and that of others were imposed on an ordinary boy of fifteen, who did not pose the problems requiring a secure accommodation order, in my view, there would be a strong case that his parents were ill-treating him. As it is, the local authority have been obliged, as a "last resort", to seek authorisation to impose restrictions on the boy's liberty which would otherwise be unacceptable, whether imposed by his parents or anyone else. That, as it seems to me, is the point of the unequivocal statutory language. The purpose is to restrict liberty, and there would be no point in such a restriction or the need for it to be authorised by the court, if it were not anticipated that much more was involved than ordinary parental control. It would have been enough to leave the local authority to exercise its parental responsibilities under section 33(3)(a) in relation to care, or to provide that the local authority should exercise such parental responsibilities in relation to children it

was looking after, or to re-enact section 10(2) of the Child Care Act 1980 , in a modified form, so that it would read something like "a local authority shall … have the same powers and duties with respect to a person who is being looked after by it … as his parents or guardian would have and may … restrict his liberty to such extent as the authority considers appropriate."

102 In short, although normal parental control over the movements of a child may be exercised by the local authority over a child in its care, the implementation of a secure accommodation order does not represent normal parental control.

Re D (A Child) [2017] EWCA Civ 1695:

95. In re K shows … that many aspects of the normal exercise of parental responsibility that interfere with a child's freedom of movement do not involve a deprivation of liberty engaging Article 5, even if they may involve a restriction on liberty of movement.

Cheshire West v P *(again)*

77 The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.

78 All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are – and have to be – applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is – and must remain – a constant feature of their lives, the restriction amounts to a deprivation of liberty.

79 Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can – and must – now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.

Re A-F (Children) [2018] EWHC 138 (Fam)

30. Now at this point in the analysis a difficult question arises which has not hitherto been addressed, at least directly. At what point in the child's development, and by reference to what criteria, does one determine whether and when a state of affairs satisfying the "acid test" in Cheshire West which has hitherto not involved a "confinement" for the purposes of Storck component (a), and where Article 5 has accordingly not been engaged, becomes a "confinement" for that purpose, therefore engaging Article 5 (unless, that is, a valid consent has been given by someone exercising parental responsibility)? This question raises a conceptual issue of some difficulty. And given what I have said in paragraphs 12-13 above, it also has very significant practical implications.

31. In addressing this question there are three preliminary points to be borne in mind:

First, the realities of the modern world, driven in significant part because the school-leaving age is now sixteen and by consequential changes in the employment patterns of young people, mean that the typical child who is not yet sixteen years old is not economically active and lives - in reality has no choice but to live - at home. So, the typical child of fifteen is, in the sense in which the expression is used in the case-law, not free to leave the place where they live. If the fifteen-year old child runs away, wanting to live on their own, they will probably not get social housing and, if not taken into care, are likely to be returned home to live either with the parents or with other relatives.

Secondly, and another reality of the modern world, children nowadays tend to live more regulated and controlled lives than children of the same age would have been used to a generation or two back. The ubiquity of the motor vehicle in modern Britain, accompanied by changes in social attitudes as to what is or is not `responsible parenting', mean that the street is no longer as safe (or seen as being as safe) an environment as it once was. It is no longer as safe (or seen as being as safe) as it once was for children to play in the street, to be allowed to roam or even to go to and from school under their own steam.

a child aged ten, even if under pretty constant supervision, is unlikely to be "confined", a child aged 11, if under constant supervision, may, in contrast, be so "confined, though the court should be astute to avoid coming too readily to such a conclusion and once a child who is under constant supervision has reached the age of 12, the court will more readily come to such a conclusion.

D. Secure accommodation:

25 Use of accommodation for restricting liberty

(1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in

accommodation in England or Scotland provided for the purpose of restricting liberty ("secure accommodation") unless it appears—

(a) that—

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm; or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

(3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

(4) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.

(9) This section is subject to section 20(8).

Re M (A Child) (Secure Accommodation) [2018] EWCA Civ 2707:

(a) The welfare paramountcy principle in Children Act 1989 section 1 does not apply to a secure accommodation application, although a local authority should consider the child's welfare when deciding whether to use the power granted by the court to restrict a child's liberty: Re M (Secure Accommodation Order) [1995] Fam 108. The court's function under section 25 is to control the exercise of the local authority's rather power than to exercise an independent jurisdiction in the best interests of the child.

(b) Section 25 is compatible with Art 5 of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950: Re K (Secure Accommodation Order: Right to Liberty) [2001] 1 FLR 526.

(c) An order may be refused on proportionality grounds (Re SS (Secure Accommodation Order) [2014] EWHC 4436 (Fam)) and any order must be necessary and proportionate (Re W [2016], supra). However, in Re T (A Child) [2018] EWCA (Civ) 2136 Sir Andrew McFarlane P at [16] noted that the ambit within which it is possible (if at all) for the court to exercise discretion where the qualifying criteria are met is limited. The central question is whether the stringent criteria within section 25 itself amount to an inbuilt proportionality check, or whether, notwithstanding the statutory wording, something more is required.

(d) In specifying the period of authorisation, the court must consider carefully the purpose to be achieved and assess as best it can the length of time which that is likely to take. The order

should be for no longer than is necessary and the court should explain its reasoning (Re W (Secure Accommodation Order) [1993] 1 FLR 692 at 697).

Re D [2019] UKSC 42*:*

113. The exercise in which we have engaged has, however, been sufficient to persuade us that section 25 is not intended to be widely interpreted, so as to catch all children whose care needs are being met in accommodation where there is a degree of restriction of their liberty, even amounting to a deprivation of liberty. There is much force in the argument that it is upon the accommodation itself that the spotlight should be turned, when determining whether particular accommodation is secure accommodation, rather than upon the attributes of the care of the child in question. This fits with the language used in section 25(1), when read as a whole. It is also consistent with the objective of ensuring that the section is not so widely drawn as to prejudice the local authority's ability to offer children the care that they need, and it ought to make it more straightforward to apply than would be the case if the issue were dependent upon the features of a child's individual care regime, so that the child might be found to be in secure accommodation in all manner of settings.

114. A restrained construction of the section is also justified by the fact that, far from being concerned with the routine sort of problems that might require a child's freedom to be curtailed, the section has a "last resort" quality about it. It is concerned with accommodation which has the features necessary to safeguard a child with a history of absconding who is likely to abscond from any other description of accommodation or to prevent injury where the child in question would be likely to injure himself or others if kept in any other description of accommodation.

115. Of course, training the spotlight on the accommodation itself does not provide a complete answer to the question as to what falls within the definition of secure accommodation. Some secure accommodation will be readily recognisable from the fact that it is approved as such by the Secretary of State, but that is by no means a universal hallmark, as that approval is not needed for all types of secure accommodation. Moreover, given that it is contemplated that secure accommodation might be provided in places such as hospitals, it seems likely that there will not infrequently be more than one purpose of the child being in the accommodation, and there is much to commend Wall J's approach to such a situation, that is to count within the definition of secure accommodation "designed for or having as its primary purpose" the restriction of liberty. Equally, the section will have to be interpreted in such a way as to allow for situations where only a part of the premises is made over to restricting liberty.

E. Unregulated and unlawful placements:

The Care Standards Act 2000 section 11

> *Requirement to register.*
> *(1) Any person who carries on or manages an establishment or agency of any description without being registered under this Part in respect of it (as an establishment or, as the case may be, agency of that description) shall be guilty of an offence.*
> *(5) A person guilty of an offence under this section shall be liable on summary conviction—*
> *(a) if subsection (6) does not apply, to a fine not exceeding level 5 on the standard scale;*
> *(b) if subsection (6) applies, to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both.*

Re T [2021] UKSC 35 *(again) per Lord Stephens:*

> *168. To my mind the central focus of this aspect of the inherent jurisdiction is on the welfare and safety of children rather than on the potential commission of a criminal offence under section 11 of the Care Standards Act 2000 by others. Obviously, that central focus requires the court to give anxious and detailed consideration to the risks to the child in respect of a placement in which such an offence may be committed. However, the High Court is not required to determine whether an offence will be committed or whether the individual has an available defence. It is sufficient for the court to be aware of the potential that such an offence may be committed by another and to examine how that impacts on the best interests of the child. It is no part of the court's function to "authorise" the commission of any criminal offence. Any order under the inherent jurisdiction does not do so. Rather, if the inherent jurisdiction is used, then the court "authorises" but does not "require" the placement by a local authority of a child in an unregistered children's home despite the potential that a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000. If a prosecution is brought, which it can be, then it is a matter for the criminal courts to determine whether an offence has been committed and if so, as to the appropriate sentence to impose.*

And per Lady Black:

> *145. I have been particularly concerned as to whether it is a permissible exercise of the inherent jurisdiction to authorise a local authority to place a child in an unregistered children's home in relation to which a criminal offence would be being committed. Ultimately, however, I recognise that there are cases in which there is absolutely no alternative, and where the child*

(or someone else) is likely to come to grave harm if the court does not act. I also have to recognise that there are other duties in play, in addition to those which prohibit carrying on or managing an unregistered children's home. I gave an idea earlier (see para 30 et seq) of the duties placed upon local authorities to protect and support children. How can a local authority fulfil these duties in the problematic cases with which we are concerned if they cannot obtain authorisation from the High Court to place the child in the only placement that is available, and with the ability to impose such restrictions as are required on the child's liberty? It is such imperative considerations of necessity that have led me to conclude that the inherent jurisdiction must be available in these cases. There is presently no alternative that will safeguard the children who require its protection.

Children Act 1989 section 22C:

(6) In subsection (5) "placement" means—

(a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b) placement with a local authority foster parent who does not fall within paragraph (a);

(c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000 or

(d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

Care Planning Etc. Regulations 2010 reg 27A

27A Prohibition on placing a child under 16 in other arrangements

A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is—

(a) in relation to placements in England, in—

(i) a care home;

(ii) a hospital as defined in section 275(1) of the National Health Service Act 2006;

(iii) a residential family centre as defined in section 4(2) of the Care Standards Act;

(iv) a school within the meaning of section 4 of the Education Act 1996 providing accommodation that is not registered as a children's home;

(v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013;

A Mother v Derby City Council & Others [2021] EWCA Civ 1867:

> *81. Standing back, the reality for social workers and other professionals dealing with young people who are exhibiting behaviour which is dangerous to themselves or others, and where there is a requirement for that behaviour to be safely contained, is that it is often simply not possible to find a suitable, bespoke, placement which fits within the statutory scheme. It is beyond contemplation that strict adherence to the regulatory scheme should prevent a young person in such a parlous situation being accommodated in a placement that is outside the statutory rules, at least for a short time, if one is available, and is the only option for protecting the young person.*
>
> *82. Over and above the regulatory framework there is a higher order of requirement and duty arising from the positive obligations placed upon the State, in the form of a local authority and the court, by ECHR, Art 2 and Art 3, and upon a local authority by CA 1989, s 22(3) and 22A.*

Lancashire County Council v G & N & NHS England and NHS Foundation Trust [2020] EWHC 2828 (Fam)

> *8. The stark choice thus faced by the court is to refuse to authorise the deprivation of G's liberty in an unregistered placement, which will result in her discharge into the community where she will almost certainly cause herself possibly fatal harm, or to authorise the deprivation of G's liberty in an unregistered placement that all parties agree is sub-optimal from the perspective of her welfare because that unregulated placement is, quite simply, the only option available.*
>
> …
>
> *66. The brutal reality facing the court in this case is that if not deprived of her liberty in an unregulated placement, there is an unacceptable risk that G will end her own life or cause herself, and possibly others, very serious physical harm. Whilst basing the court's decision as to best interests on this narrow consideration in circumstances where the placement identified is otherwise sub-optimal in terms of G's wider welfare risks reducing the application of the best interests test to an almost transactional exercise, it cannot be in G's best interests to be discharged into the community where she will, I am satisfied on the evidence before the court, be at a very high risk of fatal self-harm.*

Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales

The Guidance requires the court to monitor the progress of the application for registration and, if registration is not achieved, to review its continued approval of the child's placement in an unregistered unit.

F. Consent:

Re T (A Child) [2021] UKSC 35 *(yet again)*

159. In terms of the legal analysis deployed by the appellant in support of her position that her consent was all that was required, it appears to be along these lines:

i) If valid consent is present, a person is not deprived of his or her liberty;

ii) I consent, so I am not deprived of my liberty;

iii) Therefore there is no need for an order under the inherent jurisdiction authorising the proposed arrangements, and no welfare/article 8 basis on which a court should make such an order.

160. As I see it, this is too simplistic an analysis of the court's role in an application of this type under the inherent jurisdiction. As the President said in the Court of Appeal, there is an important distinction between, on the one hand, determining whether, in any given set of circumstances, someone is deprived of their liberty for article 5 purposes, and, on the other hand, making an order (whether under section 25/section 119 or under the inherent jurisdiction) authorising a local authority to restrict a child's liberty. The former is a factual question, involving categorisation of a specific past or present set of circumstances. The latter is a prospective order, authorising (but not requiring) a local authority to take steps in response to events which it is anticipated are likely to occur. The focus is upon whether or not the factual circumstances justify the restriction proposed, should things transpire as the local authority predict.

The potential difficulty with the consent of a 14-year-old to restrictive arrangements is illustrated by the analysis in Re T at first instance, when Mostyn J. ultimately decided that T's consent to the DoLs regime fell short of establishing the "authentic and enduring quality" which he held to be necessary for the purposes of Article 5. The Court of Appeal and Supreme Court approved Mostyn J's conclusion.

Re D (A Child) [2019] UKSC 42

It is now clear from Re D that a parent cannot consent to deprivation of liberty as an exercise of parental responsibility in respect of 16-17 year olds.

Re Z [2020] EWHC 3038 (Fam)

> *27 Parents can, pursuant to the exercise of their parental responsibility, permit or authorise the use of reasonable force on a child particularly if the child will suffer immediate and significant harm by them not so acting: see A Metropolitan Borough Council v DB [1997] 1 FLR 767 per Cazalet J at 777:*
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> > *"The local authority, which also has parental authority under the care order, is empowered, like the mother, to take such steps as may be appropriate to protect the best interests of the child; that in my view can permit the use of reasonable force for the purpose of imposing intrusive necessary medical treatment on her where a life-threatening situation arises or where a serious deterioration to health may occur if appropriate treatment is not administered"*
>
> *In this jurisdiction, I note the ambit of parental responsibility to delegate reasonable and measured chastisement of one's child is long-standing in the common law: see R v Hopley [1860] EW Misc J73; (1860) 2 F&F 202; 175 ER 1024.*

G. Attributable to the state:

London Borough of Southwark v D [2007] EWCA Civ 182

> *The Court of Appeal considered the point at which the duty under s.20(1) of the Children Act 1989 arises and the manner in which that duty can be fulfilled. In London Borough of Southwark v D the local authority had instructed the child's school not to permit the child's father to remove her from school premises. The local authority sent a social worker to the school, who met with the father. The father was said to have agreed not to have contact with the child. With the father's consent the local authority contacted father's ex-girlfriend, who was asked by the local authority if she would agree to care for the child and agreed to take care of the child, having been informed that she would be offered unspecified assistance by the local authority. Thereafter, the local authority sought to argue that the placement was a private fostering arrangement. In dismissing the appeal against the decision of Lloyd-Jones J (as he then was) that the children had been 'looked after' by reason of the local authority having fulfilled its duties under s. 20 of the Children Act 1989, Smith LJ observed as follows at [49] and [50]:*
>
> > *"[49] We are prepared to accept that, in some circumstances, a private fostering arrangement might become available in such a way as to permit a local authority,*

which is on the verge of having to provide accommodation for a child, to 'side-step' that duty by helping to make a private fostering arrangement. However, it will be a question of fact as to whether that happens in any particular case. Usually, a private fostering arrangement will come about as the result of discussions between the proposed foster parent and either the child's parent(s) or a person with parental responsibility. But we accept that there might be occasions when a private arrangement is made without such direct contact. We accept that there might be cases in which the local authority plays a part in bringing about such an arrangement. However, where a local authority takes a major role in making arrangements for a child to be fostered, it is more likely to be concluded that, in doing so, it is exercising its powers and duties as a public authority pursuant to ss 20 and 23. If a local authority wishes to play some role in making a private arrangement, it must make the nature of the arrangement plain to those involved. If the local authority is facilitating a private arrangement, it must make it plain to the proposed foster parent that she or he must look to the parents or person with parental responsibility for financial support. The local authority must explain that any financial assistance from public funds would be entirely a matter for the discretion of the local authority for the area in which the foster parent is living. Only on receipt of such information could the foster parent give informed consent to acceptance of the child under a private fostering agreement. If such matters are left unclear, there is a danger that the foster parent (and subsequently the court) will conclude that the local authority was acting under its statutory powers and duties and that the arrangement was not a private one at all.

[50] In the present case, the local authority took a central role in making the arrangements for S to live with ED. It directed the school that the father must not be allowed to take S away. It arranged a meeting attended by all the relevant parties. The father was told that he must have no contact with S. Those factors are far more consistent with the exercise of statutory powers by Southwark than the facilitating of a private arrangement. The father consented to the proposed arrangement with ED. S was consulted as to her wishes. Mr Dallas contacted ED to ask her if she would take S in. Mr Dallas delivered S to ED's home and checked that the arrangements were satisfactory. Those factors were equally consistent with an exercise of statutory powers as with the making of a private arrangement. However, there was no contact between ED and either parent. Mr Dallas said nothing to ED, either on the telephone or the following day at his office, about the arrangement being a private one, in which she would have to look to the parents for financial support or to Lambeth for s 17 discretionary assistance. Far from it, he gave her to understand that Southwark would arrange financial support. In our judgment, the judge was quite right to conclude that this was not a private fostering arrangement. Indeed, it is hard to see how he could have come to any other conclusion."

And later at [55]

*"In our judgment, the child is being looked after by the local authority as soon as the s 20(1) duty arises. It is not necessary that the child should have been accommodated for 24 hours before she or he is being looked after. We accept Mr O'Brien's submission that the child becomes looked-after when it appears to the local authority that (for one of the reasons set out in the section) the child appears to require accommodation for more than 24 hours. If that condition is satisfied, as it was here, the s 20(**1**) duty arises immediately and the authority must take steps to ensure that accommodation is provided. Either it can provide it itself by making a s 23(2) placement or it can make arrangements for the child to live with a relative, friend or connection, pursuant to s 23(6). Usually, and ideally, a s 23(2) placement will be temporary and s 23(6) arrangements for a child to live with someone will provide a longer term solution to the child's needs."*

H. Application of the principles:

Re RD (A Child) [2018] EWFC 47 *at [31]*

To determine whether someone has been "deprived of his liberty" within the meaning of Art 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. Consider the following, non-exhaustive, list of factors:

i) The extent to which the child is actively prevented from leaving the placement and the extent to which efforts are made to return the child if they leave;

ii) The extent to which forms of restraint are utilised in respect of the child within the placement and their nature, intensity, frequency and duration;

iii) The nature and level of supervision that is in place in respect of the child within the placement;

iv) The nature and level of monitoring that is in place in respect of the child within the placement;

v) The extent to which rules and sanctions within the placement differ from other age appropriate settings for the child;

vi) The extent to which the child's access to mobile telephones and the Internet is restricted or otherwise controlled;

vii) The degree of access to the local community and neighbourhood surrounding the placement and the extent to which such access is supervised;

viii) The extent to which other periods outside the placement are regulated, for example transport to and from school.

The terms 'complete' or 'constant' define 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough', and/or 'unqualified' (Re RD (Deprivation or Restriction of Liberty)

14-year old girl placed at a residential therapeutic school in Scotland.

17 RD's behaviour within Lennox House has in some measure influenced the extent to which her movements have been circumscribed. Thus, as RD settled at Lennox House last year and earlier this year, so were levels of supervision and monitoring relaxed. It is currently expected that as RD's behaviour improves, the level of supervision will again reduce. When she has been emotionally distressed in the home, particularly initially and latterly, higher levels of support than her peers have been justified. I have been careful to assess what properly represents support and what represents supervision, and to assess whether supervision of her, and control of her movements, is 'constant'.

18 From the documents filed, I have collected the following key information about RD's current regime at Lennox House:

i) RD is given a wake-up alarm call each morning, and then is left to her own devices to dress/wash and prepare for the day;

ii) She has her own room; there is a lock on the door which she can use to lock herself in, or to lock when she leaves for school (or otherwise) so that her belongings are safe; the staff have a master key; I have the impression that the lock is for RD's benefit not the staff's. RD is never locked in her room by the staff, nor are internal doors locked to manage her (or others') behaviour;

iii) RD helps around meal times "which are similar to many households" (per social worker) and she can choose to have free time after her supper with her peers and staff;

iv) RD can move around Lennox House as she chooses; there are generally staff around the communal areas to support the young people; it is said that the staff do not supervise the young people or place them "under surveillance";
v) In her leisure time, RD has the freedom to watch television in a communal area; she can have time in her room when she wishes to be alone;
vi) RD enjoys attending a boxing club; she is taken there (with another young person from Lennox House) by a member of staff;
vii) RD enjoys shopping and is taken into town by a member of staff who remains with her in town; she enjoys spending time with an animal therapist and enjoys horse riding;
viii) RD can go out into the grounds of Lennox House alone, but her visits outside the building are monitored by a member of staff watching (generally from within the house); if RD goes outside into the grounds in a group, a member of staff accompanies them to monitor/supervise;
ix) When RD was more settled, she was trusted to make short excursions in daylight hours from Lennox House alone to a local shop in the village; this opportunity has been denied her lately given her recent abscondences;
x) RD travels the hour to school by car or minibus with the other young people from Lennox House, accompanied by a member of staff. The staff member remains at the school during the hours in which RD is receiving her education, in case there are behavioural issues which require resolution; the member of staff is not generally in the classroom with her;
xi) RD enjoys fortnightly visits from her family; these visits often take place in the presence of staff, for both supervision and support - there are practical reasons for staff involvement: transport / unfamiliarity of the locality to the family. The family say that they welcome the staff on the visits, and have indicated that they would like this arrangement to remain in place until they feel more familiar with contact taking place in the community, which is unfamiliar to them;
xii) RD enjoys and seeks out opportunities for adult 1:1 time with a staff member; RD will often try to isolate a member of staff out to obtain this sole attention;
xiii) RD currently does not have her own mobile telephone (I believe a choice of her parents taken with her), but she can access the house phone at any time and make calls, which are not supervised; she does indeed call her parents most days, and calls her social worker when she feels the need to do so; there is no restriction (so I understand) on RD having a mobile phone;
xiv) Internet is available in the unit, but it is regulated by a safety feature which blocks social media and inappropriate sites; RD has access to an iPad on site; iPad use is not supervised; search histories are checked randomly.

19 Inevitably, given the wide range of ages of the residents at Lennox House, the levels of supervision and monitoring afforded to each subtly differs. I do not have the care plans of the other residents but I am advised that generally RD is not, for her age, generally treated differently from other residents in terms of supervision and surveillance at Lennox House. It is the view of the social worker that the levels of supervision are typical for residential therapeutic settings of its kind. That said, as I have indicated above, an increased level of supervision for RD is currently in place particularly when she is at school because of her recent abscondences.

37 My primary focus is, and has been, firmly on RD and on her actual circumstances at Lennox House. I have sought to isolate from the statements and reports filed those features of her life there which are relevant to the issues in play (see [18] above). It has been necessary for me to examine whether these features amount to a regime of "complete supervision and control", when compared with the notional circumstances of the typical child of the same age, station, familial background and relative maturity who is free from disability. That comparable child would, I am conscious, be a child whose life is likely to be "more regulated and controlled" than would be the case some years ago (see Re A-F at [31](ii), quoted at [33] above). Consistent with this approach is the fact that, as earlier indicated ([30] above), I am satisfied that RD is not "free to leave" Lennox House permanently any more than a 14-year old would be "free to leave" her family home.
38 The impression I have formed from the statements and reports is that the regime at Lennox House is boundaried, yet supportive. Naturally the staff keep watchful eyes on the young

residents, particularly when they cluster, but I do not discern that this level of monitoring is any more intense or overt than a parent's watchfulness over young adolescent people in a domestic setting, in similar circumstances. The presence of staff in the home is, I am satisfied, in significant measure to give the young people support and attention. These young people, because of their needs, require 1:1 attention and support at times; this is qualitatively different from 1:1 supervision. RD avowedly craves this kind of attention. Contrary to the submission of Mr. Wilkinson, I am not persuaded that the staff ratio indicates of itself that the residents are subject to complete or constant supervision and control.

39 It is the issue of supervision or surveillance and/or control which gives rise to the most difficult question on the facts of this case: i.e. to what extent the 'supervision' of the staff over RD is different from the watchful eye or supervision of a reasonable parent? It is not immaterial to my assessment that RD is described as a 14-year old who appears younger than her chronological age (see [14] above). It is fair to reflect that the degree of supervision may well be greater for her given her 'younger' presentation or late evolving maturity than it would be for a more mature 14-year old. Nor is it immaterial that RD herself does not feel "watched" all the time (see [16] above), which in itself is a reflection of the actual extent of the supervision.

40 The monitoring of RD as she ventures out into the grounds of Lennox House ([18](viii) above) is, it seems to me, ordinary quasi-parental good sense. The fact that Lennox House stands on a busy road would be a matter of concern to any parent; a rash and unthinking excursion onto the road by any young person would place them at risk. As I have earlier indicated, the fact that the staff accompany RD and her parents on some but not all of her contact visits ([18](xi) above) is more by way of support than supervision, particularly given that the parents have struggled with RD's behaviours in the past; moreover, and not insignificantly, the parents are unfamiliar with the local area, and without transport on their visits.

41 There are restrictions on RD's movement, for sure. She does not enjoy the freedoms to wander in to a town as a 14 year old young person may have the opportunity to do if living in an urban area. This restriction at least in part (perhaps a significant part) arises because of the geographic location of Lennox House - its distance from the local town and village, its distance from school, and is not in my finding because it is a function of any 'complete control or supervision' of the State. Restrictions of movement in this way do not engage considerations of 'deprivation' under Article 5 (see Guzzardi above). I am satisfied that when the staff regard it as safe for RD to be able to pay a visit independently to the local village shop (involving a walk along the A road in daylight), they let her do so, much as a parent may well do.

42 Plainly when RD's behaviour (her abscondences, disobediences, and/or her distress) justify some restrictions on her movement, these are appropriately applied and enforced; but every 14-year old is liable to appropriately imposed boundaries and sanctions. One of the obvious consequences of behaviourally acting out (for whatever reason) has been, for RD, the increase in the level of supervision, albeit for a short time. This is not altogether surprising; just as parents may temporarily 'ground' a teenager, or a boarding school head may impose limitations or tighter restrictions on a pupil's ability to leave the campus, there is an element of 'teaching a lesson' as well as promoting future safety (see Re K at [32] above). Generally, RD has the freedom to wander around the home, and it seems to me that she enjoys a significant degree of autonomy about her recreation there while not at school.

43 On the occasions when RD has temporarily absconded, she has either returned to Lennox House voluntarily, or by persuasion. As Sir James Munby P said in Re A-F at [31](i) (above) if a 14 or 15-year old child runs away from home, wanting to live on their own, they are likely to be returned home. It is as simple as that. I have read of no occasion on which RD has been forcibly restrained or detained in order to secure her return, and even if she had, I would require persuading that this would reflect anything other than reasonable and effective parental authority. It does not amount to 'complete control'.

44 I am conscious not to allow the protective or "comparative benevolence" (see [32](i)/(ii) above) of Lennox House or its regime (i.e. the fact that it is a therapeutic resource which is achieving much positive benefit for RD) distract me from the essential assessment of the liberty enjoyed (or not enjoyed) by RD there. Nor can I be diverted by the fact that RD generally recognises the value of her placement, is mainly compliant with its regime (see [32](v)) and for the main part expresses an acceptance of the value of remaining there. But these factors inevitably contribute to my assessment of the lower level of 'intensity' of the supervision or control at Lennox House.

45 All children are, or should be, as I have discussed subject to some level of restraint, adjusted to their degree of maturity; so too is RD. It is against that background that I assess RD's

situation. Having reviewed all the circumstances, and for the reasons which I have set out above, I have reached the conclusion, on a fine balance, that the regime at Lennox House does not possess the "degree or intensity" of complete control or supervision of RD which justifies the description of 'deprivation' of her liberty. In my judgment, insofar as the staff impose limits or boundaries on her movements and freedoms, these represent restrictions of the type which a child of her age, station, familial background and relative maturity would have placed upon her.

<u>Re HC (A Child: Deprivation of Liberty) [2018] EWHC 2961 (Fam)</u>

a 13-year old child with complex needs, namely:

8 HC has long been diagnosed with autism, attention deficit hyperactivity disorder ("ADHD"), dyspraxia and attachment disorder. He takes a range of medication to manage his mood and his behaviour and to support his sleeping and bladder problems. He has exhibited a range of behavioural difficulties over a number of years. He is described by staff who know him as being very active, capable of being charming, and generally well-mannered, polite and smiley. On various occasions, however, when his behaviour has been challenging and disruptive, he has damaged property and has placed himself and others at risk. Over recent months there has been a reported improvement in episodes of acute mental health difficulties, self-harming, attention-seeking behaviour and damage to property. HC responds well to clear and consistent routines and boundaries and, while he struggles to cope if these routines change unexpectedly, this has been less of a problem over the last few months.

a. Restricted freedom of movement:
The external doors of the unit are locked in order to prevent the young persons who live there from leaving unnoticed. Exit is possible only by use of key-fobs in the possession of staff members. RM indicated that there is nothing to stop HC from asking to leave the unit at any time, whether to access the garden or the community more widely, but that any such trip would take place under staff supervision. His ability to go out into the garden for a kickabout is said to be 'unlimited'.
HC is allowed only restricted access to the kitchen, due to his limited understanding of the risks associated with hot water, hobs and ovens, knives and other sharp implements etc.
HC's bedroom door is locked at night-time, but this is from the outside only (i.e. preventing others from entering) and does not prevent him from leaving the room freely.

b. Supervision, support and control:
Due to HC's various vulnerabilities and unpredictable behaviour, he requires constant supervision when out in the community. A further purpose of this supervision is to protect him from what is assessed to be a particular vulnerability to strangers who might pose a risk to him which he would not comprehend or predict.
When in the unit, he is, as described in SW's first statement, 'under constant supervision and control at all times to ensure his safety and wellbeing'. This takes the form of the presence of a familiar member of staff, who also assists HC with his personal care.
RM described HC as receiving 1:1 staffing, which is 'eyes on', in the sense that during waking hours, and apart from various personal care activities, he must be within sight of a staff member. This does not prevent his participation in such activities as football or board or computer games with peers.

c. Imposition of routine:
The unit houses 8 young persons. Meal times are standardised for all. Certain other routines are in place. During the week in term-time, HC attends school. He has a set bedtime.
HC has contact with his parents and brother for four hours every weekend. During such times, his parents ensure his welfare and safety, so no staff presence is required.

d. Restricted access to social media and the internet:
HC's use of the internet and communication by social media is 'closely monitored, so that it is being used appropriately and in accordance with the law'.

e. Restricted access to money:
HC is described as having a 'limited concept of his financial situation or in regards to money'. Accordingly, his allowance is 'managed and controlled by staff', who provide support to HC in making sensible choices as to the purchase of items such as clothing and toiletries.

f. Physical restraint:
On the relatively few occasions on which HC's behaviour has become unregulated such that he has posed a risk to himself or to others, staff have resorted to physical restraint. Staff are trained in 'Team Teach' intervention methods, which are explicitly designed to de-escalate difficult situations, but physical restraint, as a tool of last resort, is occasionally necessary. Most recently, there were three separate occasions in June 2018 on which restraint was necessary.

g. Medical:
HC is prescribed Abilify liquid, Sertraline and Promethazine, each of which he is required to take once daily; under adult supervision HC is able to administer these medicines himself, and is cooperative with the regime; indeed, he is said to enjoy taking it; there is no question of restraint or force being required to ensure compliance.

The Court's conclusion was:

43 While a number of the restrictions, particularly taken in isolation, are not starkly variant to those which might be in place for a comparable child, I am struck, in particular, by the following three facts:

> *a. the entirety of HC's interactions with peers will take place in circumstances where an adult member of his care team is charged with maintaining 'eyes-on' supervision, and with the corollary effect that the overwhelming majority of all of HC's conversations with his friends are overheard by an adult;*
> *b. apart from limited and discrete periods to undertake personal care tasks, absolutely all of HC's waking time is observed and supervised by an adult;*
> *c. HC is not able to spend any time at all in the community without close supervision.*

44 Conversely, in my experience, the typical young teenager will, on an ever-increasing basis through adolescence into young adulthood, need and enjoy:

> *a. time alone with friends and peers;*
> *b. significant periods of time left to his or her own devices without adult observation or supervision; and*
> *c. the freedom to choose to venture into and to explore his or her community.*

45 It follows that it is in these areas that HC's existence differs markedly from that of his 'typical' counterpart. It matters not that this is so by constraint of circumstance, nor that the restrictions are designed to protect him, indeed to allow him, to thrive, nor that he does not in any way rail against them. In my judgment, the degree and intensity of the restrictions, taken cumulatively

(as this is how they are experienced by HC) are such that they constitute 'complete supervision and control'.

Re JB [2019]:

A 15-year old boy placed at a residential unit in Scotland

- *(a) JB had no time on his own when out of the building;*
- *(b) JB had unsupervised contact with his family;*
- *(c) Otherwise the evidence was unclear, although the local authority contended that his liberty was deprived.*

Once JB moved to new accommodation in Ashington from February 2018, there was no deprivation of his liberty.

- *(a) This was a rented terraced house, with two adult care staff at all times upstairs and JB in the room downstairs.*
- *(b) JB has unsupervised contact with his mother, but would be contacted each half hour by staff via his telephone.*
- *(c) Should JB not return then he would be encouraged to do so but he would not be physically made to do so.*
- *(d) JB was not restricted from leaving the placement at other times. He was not to be followed by staff, but they would contact him by telephone.*
- *(e) JB has unlimited use of his telephone and unrestricted access to the internet.*

As Mr Justice Cobb said of these new arrangements:

> *"The regime outlined today is very similar to a 15-year old who is being cared by his parents. The 2:1 staffing made it look as though this was confinement, but then so is being parented by two parents. When I authorised the deprivation of liberty earlier this month, I knew precious little of the arrangements, and out of an abundance of caution did not want JB to be subjected to a further unlawful deprivation of his liberty. Having heard more about the regime, it's apparent that it does not fall within the acid test."*

Re HW:

A 14-year old girl placed at a residential unit in Doncaster

- *(a) Risk of CSE; HW thought she was older than 14; she had an absconding history; she spoke of taking risks, and of having unprotected sex as a form of self-harming behaviour;*
- *(b) HW has the capacity to understand the risks that she takes, and has undertaken work to assist her in so understanding, but nevertheless continues to place herself in risky situations;*

(c) HW has 45 minutes per day of "free time without supervision" to "spend time with friends after school". The 45 minutes can be taken at any time of day on Sundays, Tuesdays and Thursdays, provided that:

(i) HW is back at the unit by 7pm,

(ii) HW tells staff that she is going out,

(iii) She has her telephone switched on and sufficiently charged,

(iv) She does not go to certain areas of Doncaster,

(v) She does not speak to strangers or have lifts in cars or taxis, and

(vi) She does not meet her friend Tonisha.

(d) The principal demand that HW makes is to be permitted to go out of the unit, unsupervised, between 7pm and 9pm.

(e) The purpose of HW being accompanied by staff when she is out of the unit is to ensure as best as possible that she does not place herself at risk by going to a red light district, getting into cars with men, or generally placing herself in a vulnerable situation. The purpose of being accompanied is therefore one of supervision, rather than support. HW does not need support to travel outside the residential unit.

Wigan BC v Y (Refusal to Authorise Deprivation of Liberty) [2021] EWHC 1982 (Fam) (14 July 2021)

26. Y currently remains contained on the ward in a sectioned off area. The doors to the paediatric ward have been securely shut and the area cleared of all movable objects. The door to the shower in which he washes himself has been removed, and therefore Y has no privacy at all when showering or dealing with other aspects of his hygiene. He is at present sleeping on a mat on the floor and he is unable to have a pillow, or a sheet due to the risk of self-harm and suicide. Y is still being prescribed daily intra-muscular Olanzapine, which is an anti-psychotic, the hospital taking the view that without this chemical sedation Y' behaviour would be simply unmanageable. Y does not socialise. In stark contrast to every other case of this nature that has recently come before this court (none of which involved placement on a hospital paediatric ward rather than in a residential setting), neither the evidence contained in the bundle nor the submissions made by the advocates identifies any positives with respect to Y current parlous situation, whether with respect to improvements in his behaviour, his relationships with staff or otherwise. His assaults on staff are frequent, violent and cause injuries to both Y and the staff.

54. The primary purpose of a paediatric hospital ward is to treat children, not to deprive them of their liberty by means of locked doors, sparse belongings and chemical restraint. There is now no clinical basis for Y to be on the hospital ward and he is medically ready for discharge. There is therefore also now no connection at all between purpose of the hospital ward on which Y is held and the deprivation of Y' liberty. Within this context, Y currently remains contained on the ward in a sectioned off area that is not designed to restrict the liberty of a child but rather to provide medical treatment to children. The doors to the paediatric ward

have been securely shut and the area cleared of all movable objects. Accordingly, not only is there no connection at all between purpose of the hospital ward on which Y is held and the deprivation of Y' liberty, but the arrangements that are in place to restrict his liberty in that setting are, accordingly and necessarily, an entirely ad hoc arrangement that is not, and indeed can never be, designed to meet his needs.

55. The door to the shower in which Y washes himself has been removed, and therefore Y has no privacy at all when showering or dealing with other aspects of his hygiene. It must be beyond reasonable dispute that, whilst aimed at preventing him from harming himself, this is a grossly humiliating situation for a 12 year old child to be in and one that presents him with an invidious choice between embarrassment and the maintenance of personal hygiene. It would likewise appear that Y has no means of ensuring privacy on the ward when getting dressed and undressed. Added to this indignity, Y must at present sleep on a mat on the floor and he is unable to have a pillow, or a sheet due to the risk of self-harm and suicide. Y does not socialise. It is unclear on the evidence before the court how Y takes his meals or how he maintains any form of daily routine more generally. Once again, these ignominies have their roots in the fact that a paediatric hospital ward is simply not equipped to undertake the task that circumstance, and an acute lack of appropriate resources, has assigned to it.

64. Judgments given by a court should be sober and measured. Superlatives should be avoided. It is likewise prudent that a judge carefully police a judgment for the presence of adjectives. However, and as the hearing proved, in this case it is simply not possible to convey the appropriate sense of alarm without recourse to such language. In this case, having observed that in his thirty years at the Bar he had never been in a position of having to ask a court to authorise a regime for a child "as shameful as this one is", Mr Martin conceded on behalf of the local authority that, boiled down to its essence, his submission was simply that the court must today prefer the lesser of two acknowledged evils, the hospital ward or the street, in circumstances where there is currently no alternative placement. But that is not a solution that can be countenanced in a civilised society. The test laid down by the law is not which is the lesser of two evils but what is in the child's best interests having regard to the child's welfare as the paramount consideration. The parens patriae inherent jurisdiction of the court is protective in nature. As I have observed above, it would border on the obscene to use a protective jurisdiction to continue Y' current bleak and dangerous situation simply because those with responsibility for making proper provision for vulnerable children in this jurisdiction have failed to discharge that responsibility.

Re NS v Gateshead MBC [2022]

N is disabled, with complex needs. He has Down's Syndrome, autism, heart disease, arthritis, is non-verbal, double incontinent and has mobility needs in relation to longer distances.

As to care arrangements, N needs constant supervision and support in relation to all aspects of his life including eating, dressing, drying and bathing. Although he has not attempted to abscond, the external doors of his foster home must be locked, both to protect him and to ensure he does not wander out, he has a stairgate on his bedroom door, and a sound monitor in his bedroom. His medication has to be administered to him by his carers.
There are no changes in circumstances that led to this application being made, beyond the fact that it is considered that his increasing age means that he has crossed the point whereby he is now being deprived of his liberty on the objective test. As it happens, the application was issued just before N's fourteenth birthday, which possibly reflects the approximate time that this started to become a deprivation of liberty by reference to another child of similar age and station. That said, the judge accepted that there was no day when Nat had gone to bed the night before a free person, only to wake up the next day to find that his liberty had been deprived.

Salford CC v W [2021]

Although not yet in evidence before the Court, the Local Authority understands that the stepdown placement in Glasgow is "not able or willing to implement restrictive measures that are against a child's wishes." Indeed, the Local Authority has been informed that the placement's management would refuse to accept Tyler if he was subject to a deprivation of liberty authorisation, as this "goes against their ethos". The allocated social worker understands that if an authorisation were granted then Tyler will almost certainly have to move to an alternative placement.

Hertfordshire CC v KN & AK [2020] EWHC 139 (Fam)

16-yo boy, in semi-independent accommodation, whose care arrangements were described by MacDonald J as:

i) Two to one staffing at all times;

ii) Searches of AK's room and person where the situation requires this in accordance with concerns regarding AK having access to items with which he could self-harm, subject to a risk assessment;

iii) No allocated, unsupervised free time;

iv) No unsupervised use of money, Internet or mobile phone;

v) Locked doors to prevent missing episodes;

vi) Waking night staff to check on AK every 15 minutes.

There can be no anticipatory or contingent DoLs.

TFCS v A [2022]

11-yo girl with very complex needs – global developmental delay and epilepsy – but she never absconds

LA sought four DoLs:

(1) Lock all external windows and doors – but not her bedroom door - within normal precautions for family life

(2) Monitor all internet use and use parental controls – wouldn't any parent of an 11yo girl?

(3) Continuous supervision and control – but not for bathing and toilet – nonetheless considered to be continuous beyond the Guzzardi principle

(4) Restraint when physical challenge – but MGM just let her get on with it – no absconding – LA had not mentioned at this stage that there was self-injury involved

I. Damages for loss of liberty:

London Borough of Hillingdon v Neary [2011] EWCOP 1377

The Court of Protection found that a local authority had kept Steven Neary away from his home for almost a year, in breach of his ECHR Article 5 and 8 rights. Mr Neary's father had requested accommodation for a few days, but he did not return for a year, during which time the local authority failed to refer the matter to the Court of Protection, to appoint a Mental Capacity Advocate, or to conduct a review of Mr Neary's best interests in accordance with Mental Capacity Act 2005 Schedule A1 Part 8.

27.It follows that Hillingdon had no lawful basis for keeping Steven away from his home between 5 January 2010 and 23 December 2010. The fact that it believed that it was acting for the best during that year is neither here nor there. It acted as if it had the right to make decisions about Steven, and by a combination of turning a deaf ear and force majeure, it tried to wear down Mr Neary's resistance, stretching its relationship with him almost to breaking point. It relied upon him coming to see things its way, even though, as events have proved, he was right and it was wrong. In the meantime, it failed to activate the statutory safeguards that exist to prevent situations like this arising.

28. Fortunately, the evidence establishes that Steven has suffered no significant or long-term harm as a result of these events, although they were distressing for him and for his father. However, things might easily have turned out differently. By the summer of 2010, Hillingdon's plan was to send Steven to a long-term placement somewhere outside London, which could have caused irretrievable damage to his family ties, and particularly his very close relationship with his father. In the case of at least one of the facilities, it was a precondition that Steven was placed under a compulsory Mental Health Act section. It is very troubling to reflect that

this approach might actually have succeeded, with a lesser parent than Mr Neary giving up in the face of such official determination. Had that happened, Steven would have faced a life in public care that he did not want and does not need.

Damages of £35,000 were agreed by consent. Accordingly, there is no judicial analysis of the basis or rationale of the quantum.

Local Authority v Mrs D & Mr D [2013] EWCOP B34.

Mrs D was placed in a care home for a period of two weeks' respite care. This was initially with the agreement of Mr D and the acquiescence of Mrs D, however, when Mr D requested to be permitted to take Mrs D home from the care home on 8 September 2011, the Local Authority decided that it would not permit him due to concerns as to his ability to appropriately care for her. Mrs D continued to express her wish to return home, but the staff refused. It was found that Mrs D had been deprived of her liberty. A settlement of £15,000 plus costs (and for Mr D £12,500 plus costs) was approved in the context of a period of around ten months of unlawful detention, although it was stated that this would be towards the lower end of the range if the damages sum paid in Neary were to be taken as a benchmark.

R (Faulkner) v Secretary of State for Justice and others [2013] 2 WLR 1157:

"3….courts should be guided, primarily, by any clear and consistent practice of the European court.
4. In particular, the quantum of awards under section 8 should broadly reflect the level of awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living…
6. Where it is established on a balance of probabilities that a violation of article 5(4) has resulted in the detention of a prisoner beyond the date when he would otherwise have been released, damages should ordinarily be awarded as compensation for the resultant detention.
7. The appropriate amount to be awarded in such circumstances will be a matter of judgment, reflecting the facts of the individual case and taking into account such guidance as is available from awards made by the European court, or by domestic courts under section 8 of the 1998 Act, in comparable cases."

R v Governor of HMP Brockhill ex parte Evans (No 2) [1999] 1 QB 1043

Lord Woolf MR considered quantum of damages upon appeal. He discouraged the exercise of calculating an amount depending upon the amount of time falsely imprisoned stating that no two cases are the same. Furthermore, he summarised the trial judge's acceptance that there can be two elements to an award of damages for false imprisonment, the first being

compensation for loss of liberty and the second being damage to reputation, humiliation, shock, injury to feelings and so on which can result from the loss of liberty.

J. Evidence and procedure in relation to DoLs applications:

The National Deprivation of Liberty Court

Lack of procedural rules
"*Agreed criteria*" still to be agreed

Ofsted registration and attempts to register with Ofted

Whether to apply:

Re A-F (again)

48. An application to the court should be made where the circumstances in which the child is, or will be, living constitute, at least arguably (taking a realistic rather than a fanciful view), a deprivation of liberty.

High Court and Family Court proceedings

54 (3) The care proceedings will remain in the Family Court and must not be transferred to the High Court (note that a District Judge or Circuit Judge has no power to transfer a care case to the High Court: see FPR 29.17(3) and (4) and PD29C). The section 9 Circuit Judge conducting the two sets of proceedings - the care proceedings in the Family Court and the inherent jurisdiction proceedings in the High Court - can do so sitting simultaneously in both courts.
(4) If this is not possible, steps should be taken to arrange a separate hearing in front of a section 9 judge as soon as possible (if at all possible within days at most) after the final hearing of the care proceedings. Typically, there will be no need for the judge to revisit matters already determined by the care judge, unless there are grounds for thinking that circumstances have changed; indeed, the care judge should, wherever possible and appropriate, address as many of these issues as possible in the care proceedings judgment.

Evidence – the care plan and details of the arrangements and restrictions

51 (1) The nature of the regime in which it is proposed to place the child, identifying and describing, in particular, those features which it is said do or may involve "confinement". Identification of the salient features will suffice; minute detail is not required.
(2) The child's circumstances, identifying and describing, in particular, those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis.
(3) Why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do.
(4) The views of the child, the child's parents and the Independent Reviewing Officer, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health (typically the most recent documents will suffice).

52. Whether and to what extent new evidence (eg, up-to-date reports) will need to be obtained, or whether reliance on existing evidence will suffice, must depend upon (a) the extent to which the existing evidence covers the various matters referred to above, (b) the age of the existing evidence (how up-to-date is it?) and (c) the extent to which there have been any significant changes since the existing evidence was prepared.

53. The question has been raised whether a child's competency to consent to a "confinement" can properly and fairly be assessed by a local authority social worker. Whilst I would not wish to exclude evidence on the point from a social worker who feels properly qualified to express an opinion, it is plainly undesirable that the only evidence on the point should come from an employee of the local authority responsible for the "confinement". And one would, in any event, expect that if a child whose circumstances require a regime more restricted than that of a comparator contemporary is nonetheless said to have the capacity to give a valid consent, that proposition would normally be made good by evidence from either a child and adolescent psychologist or, depending upon the nature of the child's difficulties, a child and adolescent psychiatrist. I recognise that in putting it this way I am departing somewhat from what Keehan J said in Re D.

Re T (A Child) [2021] UKSC 35 at [153]–[155] *summarises the key procedural safeguards required in an application to authorise deprivation of a child's liberty under the inherent jurisdiction:*

(a) The child must be made a party,

(b) A children's guardian must be appointed,

(c) There must be regular reviews by the court,

(d) The court must undertake "considerable exploration of the circumstances to ensure that the proposal is appropriate".

(e) The court should have evidence describing the nature of the proposal and why it is necessary and proportionate to meet the child's welfare needs.

(f) There should be liberty to apply for further directions "in the shortest possible time".

The authorisation requires precise drafting.

The necessity and proportionality of the authorisations: set out the risks to the child if he or she is not detained. DoLs applications are not a matter of balancing the competing options available.

DoLs authorisations are permissive only.

There must be justification for the proposed duration, and provision for review

K. Placement of a child subject to DoLs in Scotland

Cumbria County Council v The exercise of the nobile officium in relation to child X & Others [2016] CSIH 92

Salford CC v M (Deprivation of Liberty in Scotland) [2019] EWHC 1510 (Fam)

The Children's Hearings (Scotland) Act 2011 (Effect of Deprivation of Liberty Orders) Regulations 2022

Deprivation of liberty order to have effect as if compulsory supervision order
3.—(1) Where paragraph (1) of regulation 4 or, as the case may be, 5 applies, a deprivation of liberty order has effect as if it were a compulsory supervision order for the purposes mentioned in paragraph (2).
(2) The purposes are—
(a) authorising in law the deprivation of liberty of the child who is the subject of the order in Scotland, and
(b) the application of the Act in relation to the deprivation of liberty order (in respect of which, see regulation 13).

The Children & Young People's Commissioner Scotland recommended additional factors to be taken into account before any such order is made, and that additional conditions be imposed on placing English local authorities, when the English court considers whether to grant authorisation to place a child in residential care in Scotland:

(1) There should be a detailed assessment and plan compiled in conjunction with the public authorities in Scotland, the care home, the child, and members of the family, identifying how human rights obligations are to be met.

(2) There must be an analysis of the suitability of the identified children's home to the child's needs.
(3) The court should be provided with confirmation from the head of the care home that the staff have the necessary training and experience for the plan identified.
(4) There should have been consultation with the local Scottish local authority and health board.
(5) The court should be informed who will be responsible for assessing the needs of the child and co-ordinating and delivering services, within an undertaking that the placing authority and its agents will comply with the child's ECHR and UNCRC rights.
(6) There should be arrangements for an early (within 22 days) multi-agency Team Around the Child meeting, in conjunction with the relevant Scottish local authority.
(7) There must be support of regular contact between the child and members of his or her family.
(8) Identification of appropriate arrangements for transport to and from Scotland, for example taking into account the absence of any provision of use or restraint or force while in Scotland.
(9) Funding a Scottish lawyer to assist the child, which would be in addition to the local advocacy service that is provided for by the secondary legislation

JUSTIN GRAY

Trinity Chambers
Newcastle-Upon-Tyne

October 2022

N.B. This document is intended to be read in conjunction with the presentation given on 19 October, and does not constitute legal advice